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From:

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To:

Cc:

Subject: Form 2848 for a decedent

You asked about the ability of a surviving spouse to authorize the appointment of a representative on Form 2848, Power of Attorney and Declaration of Representative, for years in which the spouses filed joint tax returns. None of the years include the year of death. The spouses held all assets in a joint *inter vivos* trust. The decedent's will nominated the surviving spouse as the decedent's personal representative. Because all assets were held by the trust, no probate estate was established and no court has appointed a personal representative for the estate. State law does not provide a surviving spouse any powers traditionally vested in a personal representative.

The surviving spouse has submitted a Form 56, Notice Concerning Fiduciary Relationship, that names himself as fiduciary. He signed Form 56 as "Executor/Personal Representative." He has also submitted a Form 2848 to appoint third parties as representatives. He signed Form 2848 in his individual capacity and as "Executor/Personal Representative."

Because the surviving spouse has not been appointed as the personal representative of the estate, Form 2848 and Form 56 should be rejected unless the surviving spouse or the purported representatives provide authority under local law that a surviving spouse has relevant powers to act as a personal representative.

Alternatively, in accordance with Treas. Reg. § 601.503(d)(3)(iii) and IRM 21.3.7.9.8(5), the Service can accept Form 2848 signed by the surviving spouse in his own name and for his spouse if the surviving spouse signs Form 2848 for his spouse as the surviving spouse and trustee of the *inter vivos* trust (the only legatee). The surviving spouse should also sign Form 56 in the same fashion.

We reach the same conclusion for spouses holding assets in an *inter vivos* trust when one spouse dies intestate. See Treas. Reg. § 601.503(d)(3)(iv).